(3)

No. 01-236

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Unknown to any party on either side of these proceedings, the district judge held a series of interviews with media reporters. These interviews apparently began after the close of the evidence in the 76-day liability phase of the trial, but before the district judge had issued his findings of fact or conclusions of law. The fact of the interviews became known immediately after the district court's final judgment was entered, when news reports of the interviews were published. The court of appeals found that the district judge's conduct violated 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges. (A118-19, 126-34) In assessing the appropriate remedy for the violation, the court of appeals, among other things, "carefully reviewed the entire record and discern[ed] no basis to suppose that actual bias infected [the district judge's] factual findings." (A136; *see also* A138-39) The court of appeals also determined that "partial retroactive disqualification minimizes the risk of injustice to the parties and the damage to the judicial process," and that "full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication." (A136) Thus, the court of appeals disqualified the district judge prospectively and retroactively to the imposition of the remedy in the final judgment.

The question presented for review is:

> Whether the court of appeals properly exercised its discretion in disqualifying the district judge both prospectively and retroactively to the imposition of the remedy, and in vacating the final judgment containing the remedial order, while refraining from setting aside his findings of fact and conclusions of law.

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The "State Respondents" — the States of New York, California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Utah, West Virginia and Wisconsin, and the District of Columbia — respectfully submit this opposition to the petition of Microsoft Corporation for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

A. District Court Proceedings

On May 18, 1998, the United States and the twenty-one States (including the District of Columbia) filed civil antitrust actions against Microsoft. These actions, subsequently consolidated, alleged that Microsoft violated: (a) section 1 of the Sherman Act by entering into unlawful exclusive dealing arrangements, and by unlawfully tying its Internet Explorer (a web browser) to its Windows 95 and Windows 98 operating systems; and (b) section 2 of the Sherman Act by unlawfully maintaining its monopoly in the personal computer ("PC") operating system market, and by unlawfully attempting to monopolize the Internet browser market. The States' complaint also alleged analogous violations of state antitrust statutes. Both actions sought injunctions against Microsoft's unlawful conduct, and other equitable relief to restore competitive conditions in the affected markets. (A9)

The bench trial began in October 1998, and consumed 76 trial days before concluding in June 1999. (A10) The trial included proof of a lengthy and wide-ranging campaign of anticompetitive conduct by Microsoft, designed to extinguish

"middleware" threats to Microsoft's PC operating system monopoly. Evidence demonstrated that Microsoft, by many means, directed its conduct to eliminating actual or potential competition by Netscape, which distributed a competing Internet browser (Navigator), and by Sun, which offered its potentially competing Java technologies. *See generally United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 17-19, 28-34, 98-112 (D.D.C. 1999) ("*Microsoft I*"); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 38-39 (D.D.C. 2000) ("*Microsoft II*"). In summary, Microsoft's anticompetitive acts included:

- imposing Windows licensing restrictions on original equipment manufacturers ("OEMs"), while also pressuring them to promote Internet Explorer and to exclude Netscape's Navigator, thereby shutting out competing Navigator from the OEM distribution channel (*Microsoft I* at 38-50, 53, 58-69, 110-11; *Microsoft II* at 39-41; A32-40);

- "binding" its previously separate Internet Explorer web browser to its Windows operating system so as to commingle the browser's computer source code with code that performed non-browser functions, precluding OEMs and users from removing user access to Internet Explorer, and deterring OEMs from pre-installing a rival web browser, such as Navigator (*Microsoft I* at 48-66; A40-46);

- imposing exclusionary arrangements on Internet access providers, Internet content providers, and independent software vendors to foreclose distribution of Netscape's browser (*Microsoft I* at 46-48, 69-94; *Microsoft II* at 41-43; A46-55);

- imposing exclusionary arrangements on Apple Computer, a vertically integrated maker of computer hardware and software, to foreclose distribution of Netscape's browser (*Microsoft I* at 94-98; *Microsoft II* at 42-43; A56-58);

- subverting potential competition from Sun's Java technologies by affirmatively deceiving Java developers about the Windows-specific tools that Microsoft delivered to them (*Microsoft I* at 105-10; *Microsoft II* at 43-44; A58-59, 62-63);

- entering into dozens of so-called "First Wave Agreements" with major software vendors to promote Microsoft's Java products exclusively (*Microsoft I* at 108-09; A60-62); and

- pressuring Intel into stopping aid to potentially competing Java technologies (*Microsoft I* at 109-10; *Microsoft II* at 43; A63-65).

In November 1999, the district court issued extensive findings of fact, distilled from the parties' own detailed submissions. *Microsoft I*, 84 F. Supp. 2d 9. *See also* Plaintiffs' Joint Proposed Findings of Fact — Revised, dated September 10, 1999 (874 pages); Microsoft's Revised Proposed Findings of Fact, dated September 10, 1999 (679 pages). After an unsuccessful attempt to settle the case through mediation, the district court entered its conclusions of law on April 3, 2000. *Microsoft II*, 87 F. Supp. 2d 30. The district court held Microsoft liable on the section 1 tying claim, and on the section 2 monopoly maintenance and attempted monopolization claims. The court further found Microsoft's conduct to have violated State antitrust laws.

The district court, however, found no section 1 violation based on Microsoft's exclusive dealing arrangements. The district court then held a day's hearing on the remedy to be imposed, and issued its final judgment on June 7, 2000. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000). The final judgment substantially adopted plaintiffs' proposed remedy, and included provisions directing Microsoft to divest its PC applications assets from its operating system assets, as well as interim injunctive relief, pending divestiture, directed to conduct by Microsoft. (A10-11)

Microsoft filed a notice of appeal from the final judgment, and the court of appeals ordered that any proceedings before it be heard *en banc*. (A11) On motion by the United States, the district court certified appeal of the case brought by the United States directly to this Court, pursuant to the Expediting Act, *see* 15 U.S.C. § 29(b), and the States similarly sought direct appeal and also filed a precautionary petition for a writ of certiorari in advance of judgment in their case. This Court declined to hear the United States' appeal, and denied the States' certiorari petition. *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000). Thus, an appeal before the court of appeals, sitting *en banc*, proceeded. Pending disposition of the appeal, the district court stayed the final judgment. (A11)

B. Court of Appeals' Proceedings

The court of appeals heard two days of argument of Microsoft's appeal in February 2001, after which it issued a unanimous 125-page decision. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). (A1) The court held that Microsoft had monopoly power in the market for Intel-

compatible PC operating systems, and that it unlawfully maintained that monopoly by many anticompetitive acts. (A16-69) The court of appeals thus affirmed the district court's ruling that Microsoft was liable under section 2 of the Sherman Act. On the section 1 tying claim, the court of appeals vacated the district court's ruling, and remanded the case for further proceedings under the rule of reason, rather than under the *per se* rule generally applicable to tying. (A77-101) The court of appeals also vacated the district court's holding of liability for attempted monopolization (A69-77), and its remedy decree. (A101-18)

Finally, the court of appeals disqualified the district judge from any further proceedings in the case. The basis for this part of the court's decision — the only issue raised in Microsoft's petition for certiorari — is as follows:

C. The Disqualification Ruling

Immediately after the district judge entered final judgment in June 2000, press reports of interviews with the judge began to appear. These reports indicated that the district judge gave interviews to select reporters, apparently beginning in September 1999, several months after the trial evidence ended. The district judge "embargoed" the interviews, insisting that their fact and content remain undisclosed until he issued the final judgment. (A119-20) The public reports reflect that the district judge discussed topics in the case, and he expressed his views, based on trial evidence presented to him, to the reporters. At least according to published reports, those views tended not to be favorable to Microsoft. (A122-26) Neither side knew of the contacts until the press reports following the final judgment. The district judge also spoke publicly regarding the case after entering the final judgment. (A119)

The court of appeals found that the district judge's conduct violated Canons 2 and 3A(4) and (6) of the Code of Conduct for United States Judges. (A118-19, 126-30) The court further found that the district judge violated 28 U.S.C. § 455(a), which directs that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (A132) As the remedy for the improper conduct, the court of appeals disqualified the district judge prospectively, as well as retroactively to the date that he entered his remedial final judgment. (A135) Relying in part on this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988), the court of appeals expressly declined to make the disqualification complete to the time that the disqualifying conduct began. The court explained its exercise of discretion as follows:

> This partially retroactive disqualification minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. Although the violations of the Code of Conduct and § 455(a) were serious, full retroactive disqualification is unnecessary. It would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect.
>
> Most important, full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication. The District Judge's conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice. There is no reason to presume that everything the

> District Judge did is suspect. *See In re Allied-Signal Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989); *cf. Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301-02 (D.C. Cir. 1988). Although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected his factual findings.
>
> The most serious judicial misconduct occurred near or during the remedial stage. It is therefore commensurate that our remedy focus on that stage of the case.
>
> * * *
>
> [A]lthough Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias.

(A135-36, 138-39)

D. Post-Decision Proceedings

After the D.C. Circuit's ruling, Microsoft moved for rehearing of that portion of the court's decision which held that Microsoft had unlawfully commingled computer code for its Internet browser with code for other parts of its Windows operating system. (Microsoft's Petition for Rehearing, dated July 18, 2001) After the court of appeals denied rehearing (Order, dated August 2, 2001), Microsoft filed its petition for a writ of certiorari in this Court, and moved in the court of appeals for a stay of the mandate.

In both sets of papers, Microsoft did not raise the "code commingling" issue presented in its rehearing petition to the court of appeals, but rather asserted its "actual bias" argument with respect to the disqualification remedy ordered. (Microsoft's Petition in this Court; Microsoft's Motion for Stay of the Mandate, dated August 7, 2001, in the court of appeals) The court of appeals unanimously denied Microsoft's stay motion, noting that "it appears that Microsoft has misconstrued our opinion, particularly with respect to what would have been required to justify vacating the district court's findings of fact and conclusions of law as a remedy for the violation of 28 U.S.C. § 455(a)." (Order, dated August 17, 2001)

The mandate thus issued on August 24, 2001, and the case has since returned to the district court, where it has been re-assigned to United States District Judge Colleen Kollar-Kotelly.

REASONS FOR DENYING THE WRIT

The "conflict" that Microsoft contends arises from the court of appeals' disqualification ruling is based on a misreading of the court of appeals' decision, and on similar misreadings of *Liljeberg* and the other authorities on which Microsoft relies. The unanimous *en banc* D.C. Circuit's disqualification remedy is a proper application of *Liljeberg*, in which this Court expressly counsels the courts of appeals to exercise discretion in determining the remedy for violation of 28 U.S.C. § 455(a) and the Code of Conduct. Further, the court of appeals' judgment is interlocutory, and not ripe for review by this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *LILJEBERG*

Microsoft contends that, in adopting a remedy for the district judge's disqualifying conduct, the court of appeals improperly required Microsoft to show actual bias as a legal prerequisite for vacating the district judge's findings of fact and conclusions of law. According to Microsoft, by requiring such a showing, "the court of appeals' decision conflicts with the decisions of this Court and other courts of appeals." (Pet. at 16) Microsoft's reading of the court of appeals' decision is incorrect.

The court of appeals did not adopt an "actual bias" requirement. Instead, the court carefully considered numerous factors pertinent to the disqualification remedy — only one of which was the absence of actual bias — and the court chose partial, but not full, retroactive disqualification and vacatur. In so exercising its discretion, the court of appeals conscientiously performed the analysis that this Court prescribed in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) — the only decision of this Court that Microsoft identifies as "conflicting." The D.C. Circuit applied the *Liljeberg* analysis to an individual set of facts, and determined, as a matter of discretion, the remedy that it deemed appropriate in a case-specific context.

Microsoft's dissatisfaction with the result of the court of appeals' exercise of its discretion does not create an issue worthy of this Court's exercise of its certiorari jurisdiction. Supreme Court Rule 10 instructs that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Thus, certiorari is not a vehicle to review whatever arguable error Microsoft claims the court of appeals made in applying *Liljeberg*. Quite the contrary, as this Court said in that case:

> In considering whether a remedy is appropriate, we do well to bear in mind that in many cases — and this is such an example — the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.

Liljeberg, 486 U.S. at 862.

A. The D.C. Circuit Properly Applied the Multi-Factor Analysis Called For by *Liljeberg* In Exercising Its Discretion As to the Disqualification Remedy

Microsoft argues that there is a "conflict" between the decision below and *Liljeberg*, which it posits requires vitiating all proceedings whenever an appearance of impropriety requires a trial judge to be disqualified. In particular, Microsoft finds "conflict" in the fact that, although both *Liljeberg* and this case present instances of an appearance of impropriety, in *Liljeberg* this Court affirmed an order directing a retrial, whereas here the D.C. Circuit did not order the same relief. (Pet. at 17-18) *Liljeberg*, however, holds only that *that* case should have been retried — not that *every* case presenting an appearance of impropriety requires the same remedy. That the remedy here varies from that in *Liljeberg* merely reflects the fact-specific nature of the determination that courts are required to make in exercising their discretion.

In *Liljeberg*, the Fifth Circuit had vacated a judgment where, throughout the litigation, the trial judge had been a

trustee of an entity interested in the outcome of the case. The precise question presented to this Court was whether the court of appeals had the power to vacate a judgment under Rule 60(b) of the Federal Rules of Civil Procedure to remedy the violation of 28 U.S.C. § 455(a). *See Liljeberg*, 486 U.S. at 863. This Court held that "Rule 60(b)(6) relief is . . . neither categorically available nor categorically unavailable for all § 455(a) violations." *Id.* The Court emphasized that the decision whether a violation of section 455(a) calls for vacatur of a judgment, either in whole or in part, is a matter of discretion in which various factors are properly considered:

> Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.
>
> * * *
>
> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 862, 864.

Taking into account these considerations, this Court affirmed the Fifth Circuit's vacatur of the trial court judgment, noting that the court of appeals' ruling "reflects an eminently sound and wise disposition *of this case*." *Id.* at 868 (emphasis added). This Court, however, also emphasized that "[t]here need not be a draconian remedy for every violation of § 455(a)." *Id.* at 862. Thus, this Court emphatically did not adopt a *per se* rule requiring vacatur of any court ruling issued in a case where there was a disqualifying appearance of impropriety.

Here, the D.C. Circuit specifically acknowledged the very factors identified in *Liljeberg* (A135), and it carefully followed *Liljeberg's* roadmap in deciding the remedy to adopt. The court of appeals stated that "[o]ur application of *Liljeberg* leads us to conclude that the appropriate remedy for the violations of § 455(a) is the disqualification of the District Judge retroactive only to the date he entered the order breaking up Microsoft [*i.e.*, the final judgment, which includes the break-up provisions]." (A135) The court detailed the considerations underlying the exercise of its discretion to disqualify the district judge retroactive to this date, instead of to an earlier date that would have also set aside the judge's findings of fact and conclusions of law. These considerations included the following:

- Partial retroactive disqualification will minimize the risk of injustice to the parties and the damage to public confidence in the judicial process. (A135)

- Full retroactive disqualification would unduly penalize plaintiffs, who were innocent and unaware of the district judge's misconduct. (A135)

- Full retroactive disqualification would have only slight marginal deterrent effect. (A135)

- "Most important" (A136), full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication because there was only an appearance of impropriety, not actual bias. (A136, 138-39)

- The most serious judicial conduct occurred at or near the remedial stage of the case. (A136)

Thus, contrary to Microsoft's argument, the court of appeals did not defy *Liljeberg* by adopting a "requirement that Microsoft show actual bias." (Pet. at 17) Nor did the court "hold[] that vacatur of the findings of fact and conclusions of law is inappropriate absent a showing of actual bias." (*Id.*) Instead, the court of appeals conscientiously performed the sensitive exercise of discretion that this Court called for in *Liljeberg*.

Microsoft's "actual bias" argument simply misreads the court of appeals' decision. The court itself said exactly that in denying Microsoft's motion to stay issuance of the mandate: "it appears that Microsoft has misconstrued our opinion, particularly with respect to what would have been required to justify vacating the district court's findings of fact and conclusions of law as a remedy for the violation of 28 U.S.C. § 455(a)." (Order of August 17, 2001)[1]

1. Similarly, there is no merit to Microsoft's argument that the court of appeals' "*cf.*" citation to *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287 (D.C. Cir. 1988), suggests that the court "relied on a line of authority overruled by this Court in *Liljeberg*." (Cont'd)

B. Microsoft's Factual Claim That The Court Below Erroneously Found No Actual Bias Is Not A Proper Basis For Certiorari Review

Microsoft also suggests that the court of appeals erred in not finding actual bias on the part of the district judge because, Microsoft maintains, such bias may be inferred from the public reports of his comments. (Pet. at 16 n.6, 26-27). However, the office of a certiorari writ is not to review claims of erroneous fact finding by the court below. As this Court has often said, certiorari review "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417

(Cont'd)

(Pet. at 20; *see* p. 7 above; A136.) *Liberty Lobby* — a pre-*Liljeberg* decision — adopted the view that "[o]rders entered prior to the recusal motion are unaffected by its disposition, absent a showing of actual bias." 838 F.2d at 1302. However, immediately after *Liljeberg*, was decided, when the issue arose again, the D.C. Circuit expressly "disclaim[ed] any reliance upon prior circuit law limiting to prospective application the remedies available on a motion to disqualify." *Jenkins v. Sterlacci*, 856 F.2d 274, 275 (D.C. Cir. 1988). As in *Jenkins*, the court of appeals here applied *Liljeberg*, not *Liberty Lobby*. The D.C. Circuit's "*cf.*" citation merely reminds that various considerations inform the decision whether to give a disqualification ruling retroactive, as well as prospective, effect. That is entirely consistent with — indeed, inherent in — the discretionary balancing analysis called for in *Liljeberg*. Moreover, the precise proposition for which the court of appeals cited *Liberty Lobby* was that "[t]here is no reason to presume that everything the District Judge did is suspect." (A136) For this proposition — which also is consistent with *Liljeberg*, and with which Microsoft does not appear to disagree — the court of appeals' primary authority was *In re Allied-Signal, Inc.*, 891 F.2d 974, 975-76 (1st Cir. 1989) (Breyer, J.). *Allied-Signal* is a post-*Liljeberg* decision, the validity of which Microsoft does not dispute.

U.S. 600, 616-617 (1974); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Magnum Import Co., Inc. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"); Supreme Court Rule 10.

Further, Microsoft's effort to have this court review an allegedly erroneous factual determination is particularly ill-conceived here, where, as the court of appeals recognized, the concern was not so much with "what the District Judge said, but to whom he said it and when." (A133) The district judge's comments as to his views of the parties were made after he heard the evidence offered at trial. As this Court remarked in *Liteky v. United States*, 510 U.S. 540, 550-51 (1994):

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Thus, as the D.C. Circuit found, the district judge's expression of his views to reporters created an appearance of bias, not actual bias. That conduct violated the Code of Conduct and section 455(a). (A134, 136) Mindful of the facts and circumstances of the case, the unanimous court of appeals

decided to disqualify the district judge and to vacate his remedy decree, but declined to set aside the district judge's detailed findings of fact and conclusions of law. This was an appropriate exercise of the discretion that the court of appeals was called upon, under *Liljeberg*, to exercise.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS

Microsoft also asserts that there is a "conflict" between the decision below and the decisions of other courts of appeals in *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), and *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991). (Pet. at 18-20) However, in each of these cases, the court of appeals — like the D.C. Circuit here — directed a remedy that it determined was warranted on the facts presented.

In *Cooley*, the district judge appeared on national television where he was interviewed concerning a case in which the judge had issued an injunction against protests at an abortion clinic. The judge thereafter presided over criminal cases arising from protestor interference with enforcement of the court's injunction, during which he denied motions to disqualify himself. The Tenth Circuit held that the district judge's television appearance violated section 455(a). Applying *Liljeberg's* admonition that "justice must satisfy the appearance of justice," 486 U.S. at 864 (internal quotation marks omitted), the Tenth Circuit stated that "[t]o best serve that goal, we are satisfied that the remedy *in this case* is to vacate the conviction and sentence of each of the defendants in these cases, and remand the cases to the district court for a new trial before a different judge." 1 F.3d at 998 (emphasis added).

Thus, in a case with strikingly different facts from the present one — among other things, the appearance of impropriety in *Cooley* was evident as soon as the criminal prosecutions were filed — the Tenth Circuit, in the exercise of its discretion, followed *Liljeberg* in adopting what it considered an appropriate remedy. The court of appeals in the present case similarly crafted its remedy to "minimize[] the risk of injustice to the parties and the damage to public confidence in the judicial process." (A135)

In *Preston*, the unsuccessful plaintiff learned after trial that, before assuming the bench, the district judge had been of counsel to a firm that represented an indemnitor of the defendant. Consequently, as in *Cooley*, the appearance of impropriety was evident at the outset of the case and persisted throughout its duration. Relying on *Liljeberg*, the Ninth Circuit concluded, without further explanation, that "[t]here is no way . . . to purge the perception of partiality *in this case* other than to vacate the judgment and remand the case to the district court for retrial by a different judge." 923 F.2d at 735 (emphasis added). Thus, once again, the court applied *Liljeberg* to an individual set of facts that were unlike those presented here, and the court came to a remedy that it regarded as appropriate.

Other disqualification cases similarly emphasize this same fact-specific approach. For example, *In re Boston's Children First*, 244 F.3d 164, 171 (1st Cir. 2001), the First Circuit granted disqualification under section 455(a) "based on the particular events in, and character of, a highly idiosyncratic case," and noted "the continuing need for a case-by-case determination of such issues."

Rather than presenting a conflict, decisions of other courts of appeals support the approach of the court below. In *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), the Third Circuit adopted a disqualification remedy similar to that ordered by the court of appeals here. Specifically, on an interlocutory mandamus petition, the court held that, although the trial judge had to be disqualified under section 455(a), the judge's pre-disqualification rulings should remain intact (although the court authorized the new trial judge to reconsider certain discretionary trial structure rulings). *Id.* at 787-88. The Third Circuit expressly noted that, in complex litigation, "vacatur of rulings ought to be as limited as possible while remaining consistent with the purposes of section 455." *Id.* at 786 (citing *In re Allied-Signal Inc.*, 891 F.2d 967, 972-73 (1st Cir. 1989) (Breyer, J.), *Polaroid Co. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir. 1989), and *In re Cement and Concrete Antitrust Litig.*, 515 F. Supp. 1076, 1081-82 (D. Ariz. 1981), *mandamus denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of quorum*, 459 U.S. 1191 (1983)).

School Asbestos reinforces that the remedy determination under *Liljeberg* is fact-specific. The Third Circuit weighed a variety of factors, as *Liljeberg* prescribes, and concluded, on balance, that vacating all of the disqualified judge's earlier rulings was unwarranted. 977 F.2d at 785-88. *Cf. Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77 (2d Cir. 1996) (the district judge did not err in hearing and deciding a preliminary injunction motion after he had decided to disqualify himself).[2]

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2. Microsoft misreads *School Asbestos* as holding only that when a trial judge is disqualified, prior rulings need not be vacated if the rulings are subject to *de novo* review, or will not be given preclusive effect elsewhere. (Pet. at 23 n.7, 24 n.8) As noted, the Third Circuit adopted and applied *Liljeberg's* balancing approach in deciding the scope of the disqualification remedy.

As these decisions make clear, the fact that different courts may adopt different remedies on different facts does not amount to a "conflict" among the circuits. Where, as here, judicial discretion is inherent in the governing rule of law, it is entirely foreseeable that different courts may apply the same legal rule to different facts and adopt different remedies. The remedy adopted in any particular case does not present an issue meriting certiorari review. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 813 (1931) (dismissing the writ of certiorari as improvidently granted where it appeared that "the asserted conflict in decisions [arose] from differences in states of fact, and not in the application of a principle of law").

Liljeberg thus establishes a clear analysis governing the lower courts' exercise of their discretion in deciding the remedy upon disqualification. Like the other courts of appeals whose decisions Microsoft cites, the D.C. Circuit adopted and correctly applied the analysis called for by this Court.

III. THE JUDGMENT IS INTERLOCUTORY AND THUS NOT RIPE FOR REVIEW

As part of its decision, the court of appeals set aside the district court's holding that Microsoft violated section 1 of the Sherman Act by tying its Internet Explorer web browser to its Windows operating system, as well as the district court's remedy decree, which included provisions calling for Microsoft to divest its applications assets from its operating system assets. The court of appeals remanded these matters to the district court for further proceedings upon reassignment to a new judge.

"[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"). This prudential consideration promotes the strong federal policy against piecemeal review. *Cf. Cobbledick v. United States*, 309 U.S. 323, 326 (1940); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (denial of disqualification of counsel is not an interlocutory order that is appealable as of right).

Microsoft nevertheless argues that the court of appeals' disqualification remedy is ripe for this Court's review. (Pet. at 15) Yet, in the same breath, Microsoft foreshadows the likelihood that it will later petition for certiorari to review other parts of the court of appeals' decision. (*Id.*) Thus, a grant of certiorari now could lead to multiple, piecemeal appeals — the very result that this Court's policy disfavoring interlocutory appeals is designed to avoid.

Microsoft has been found to have committed serious violations of section 2 of the Sherman Act through conduct that began in 1995. Those violations remain unremedied; their effects continue to shape market developments. In a few weeks, Microsoft is expected formally to introduce Windows XP, the next generation of its monopoly operating system. With each succeeding version of Windows, Microsoft not only fortifies its illegally maintained operating system monopoly, but also uses the ubiquity of that operating system as a distribution device for additional software

products, thereby extending its power to emerging complementary markets. Just as Microsoft crushed competitive threats from the browser and from Java as part of its monopoly maintenance scheme (A29, 32-65), additional injury to competition may be predicted. To the extent that harm materializes, consumers will suffer.

There is an urgent need for the district court on remand to fashion appropriate relief to end the effects of Microsoft's anticompetitive conduct, and to restore the competition that Microsoft unlawfully suppressed — and for the district court's decree on remand to receive final appellate review. Until a final remedy is in place, each day contributes to additional injury to the public interest in competition. Meanwhile, because of Microsoft's monopoly position, its products and conduct overhang the market. The pendency of this case casts a cloud of uncertainty, making it difficult for industry participants to plan or to commit resources efficiently.

Bearing in mind both Microsoft's own failure to challenge virtually *any* of the district judge's detailed findings of fact (*see, e.g.*, A19, 21, 136), and the *en banc* court of appeals' unanimous affirmance of the district judge's monopoly maintenance ruling, nothing would undermine public confidence in the judiciary more than a retrial of this lengthy and complicated antitrust case. Accordingly, the public interest is served by completing this case sooner, rather than later or in a piecemeal fashion.

The limited grant of certiorari that Microsoft seeks at this stage of the on-going proceedings would protract the adjudicative process, prolong the uncertainty, and compound the difficulties of fashioning and implementing effective relief in this dynamic marketplace.

CONCLUSION

The petition for a writ of certiorari should be denied.

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